



FAQ for FIRPTA

This FAQ is for general orientation purposes only, and does not constitute, and should not be relied upon as, any legal or tax advice. Real estate agents and Firms are not permitted by state or federal law to provide legal or tax advice regarding FIRPTA, or any other tax or legal matter. The parties are directed to consult their own legal and/or tax advisors with any questions about FIRPTA or any issues herein.

1. What is FIRPTA?

FIRPTA stands for Foreign Investment In Real Property Tax Act (26 USC §1445). It is a tax law designed to ensure payment of tax to the Internal Revenue Service (IRS), as may be due, when US property is sold by any "foreign person". "Foreign person" under FIRPTA may include individuals and entities. FIRPTA allows for the withholding of 15% of the amount realized (sales price in most cases), which would then be remitted to the IRS, unless the Seller can demonstrate an exemption under FIRPTA or qualifying statement from the IRS indicating relief from withholding or the specific amount owed.

2. What does FIRPTA require the seller to do at the closing of their real estate sale?

If the seller is a "foreign person" under FIRPTA, and cannot demonstrate eligibility for an exemption under FIRPTA or obtain a qualifying statement from the IRS indicating that withholding is not required, FIRPTA calls for the withholding of 15% of the amount realized to be remitted to the IRS (amount subject to withholding may vary by amount realized in certain residential transactions over \$300,000).

A Seller that is not a "foreign person" would not be subject to any withholding under FIRPTA **unless** said Seller fails or refuses to provide a sworn certification under penalty of perjury, as required under FIRPTA, that said Seller is not a "foreign person" (e.g., Certification of Non-Foreign Status). That certification is required under FIRPTA prior to closing and would be handled by the closing agent or qualified substitute.

3. How can Buyer become liable for unpaid taxes by a "foreign" seller?

FIRPTA provides that if the taxes are not paid upon the sale of property by a "foreign person," or if the indicated withholding is not done by Buyer at closing, and if no exemption applies, **Buyer may be held directly liable by the IRS** for the unpaid tax and a tax lien may be placed on the purchased property. It is therefore important that Buyer ensure that any amounts owing or to be withheld under FIRPTA are paid/withheld. Or, in the case of a non-foreign seller, Buyer would want to ensure that seller has executed the FIRPTA-compliant certification of Seller's non-foreign status, which under FIRPTA would be due by closing and would typically then be retained by the qualified substitute, on Buyer's behalf.

4. What is example of an exemption under FIRPTA applicable to a "foreign person"?

FIRPTA withholding does not apply if the seller is a not a "foreign person" and if seller completes a FIRPTA-compliant certification of seller's non-foreign status.

Another exemption available is when the property is residential, the amount realized for the property does not exceed \$300,000, and the buyers (individual or individuals) intend to use the property as a residence for the requisite period, as defined under FIRPTA. Agents and Firms do not determine eligibility for any exemption.

Another exemption is if the "foreign person" seller can obtain a qualifying statement from the IRS stating that no withholding is required in that case or determining if a lesser amount should be withheld. Any "foreign person" seller seeking such exemption or lesser withholding is responsible for obtaining said documentation from the IRS directly. Obtaining such documentation completed may take 90 days or more, depending, so it may be that even if eligible, a "foreign person" seller would need to submit to withholding at closing and then apply for refund from the IRS after closing. Real estate agents and Firms, and title companies, are not involved in applying for or advising about any such applications or exemptions.

First Weber, Inc. (Not intended as legal or tax advice. Consult your own legal counsel or tax advisor with any questions about FIRPTA or any issues addressed above.)

10/2019

5. Why does First Weber recommend that all sellers consider including or countering to include the FIRPTA Addendum?

No real estate agents or Firms may provide legal or tax advice, and no such advice is given or intended here, or through recommendation of any Addendum or other provisions. However, the recommended provisions in the FIRPTA Addendum are intended to apply as follows, depending on the seller's status:

If Seller is a "foreign person" under FIRPTA: The WB-11 as drafted includes representation that the Seller is not a "foreign person" under FIRPTA. So, if Seller is a "foreign person," Seller would have to address that language. That would typically be done with a Counter-Offer, or if a correcting provision were included in the Offer. If notification of Seller's status is promptly disclosed, it would be recommended the parties consider removal of the buyer termination right premised upon lack of certification.

If Seller is not a "foreign person" under FIRPTA: Although not directly subject to FIRPTA, non-foreign sellers are to provide a FIRPTA-compliant certification to be retained by Buyer or on Buyer's behalf. Prompt notification is recommended as preferable, and if done per the FIRPTA Addendum it would satisfy (remove) the 15 day prior to closing delivery requirement imposed in the WB-11, but not required under FIRPTA law. Per the FIRPTA Addendum and per FIRPTA requirements, the closing agent or qualified substitute, as defined under FIRPTA, would require a sworn certification with Social Security number or Tax Identification Number for each such seller (e.g., Certification of Non-Foreign Status), and that certification would then typically be maintained by the qualified substitute, on behalf of buyer, for proof of exemption.

The parties are always encouraged to consult their own independent counsel and/or tax advisers and may negotiate and modify any provisions in their offer, including "recommended" provisions. And such provisions, even if "recommended," are not required and may not apply to the circumstances of the parties in any given situation.

6. Why is the Protect Sensitive Information provision added?

This provision is added because FIRPTA does not require Social Security numbers and Tax Identification Numbers be given to, or transmitted by, real estate agents or Firms. Such sensitive information is required under FIRPTA to satisfy, for example, the Non-Foreign Status certification, which per above is to be handled solely by the closing agent or qualified substitute as defined under FIRPTA. We therefore recommend such sensitive information be provided only to the closing agent or qualified substitute. Due to cybersecurity concerns, the parties should only transmit such information by secure means, and not by email, and the parties are therefore asked to respect the real estate agent and Firm's policy of not obtaining, retaining, transmitting or forwarding such sensitive information. Hence the recommended provision which would invalidate any such delivery if made to the real estate agents or Firms involved.

7. What if the parties do not agree to the terms recommended in the FIRPTA Addendum?

That is up to the parties. But if the Seller does not provide the recommended certification of status and secure the accompanying provision modifications, Seller would have to contact a closing agent or qualified substitute directly and execute whatever conforming certification they provide. And, without modification of the referenced Offer provisions, the Sellers could face deadlines or termination rights, as referenced in the FIRPTA Addendum. It is therefore recommended Seller at least consider inclusion of the notification certifications and FIRPTA Addendum, and the parties may negotiate and modify, or reject, as they see fit.

Buyers may also consider the FIRPTA Addendum for submission of an offer, if Buyers believe addressing such issues may make Buyers' offer more attractive. That, of course, is entirely up to the Buyers.

8. What is a closing agent or "qualified substitute"?

The term qualified substitute as used here means the attorney or entity agreeing to handle the closing. Please note that title companies have no obligation to accommodate the paperwork or withholding associated with FIRPTA without consenting to do so, and are not responsible for verifying Seller or Buyer status or certification representations, or applicability of any claimed exemption, unless expressly agreeing to do so. The qualified substitute would typically be engaged to hold any certification, such as certification of non-foreign status, on behalf of Buyer.

9. Must each non-foreign seller execute a Certification of Non-Foreign Status?

Yes, the identity of each non-foreign seller must be certified under FIRPTA.

For “foreign person” sellers, each is requested to certify that party’s “foreign person” status under FIRPTA, and each such “foreign person” is subject to withholding, even for fractional interest in a property (although such determinations may be handled by the closing agent or qualified substitute, but not by real estate agents or Firms).

10. Would Buyer have to execute any certification or affidavit?

Yes, it is possible, to confirm eligibility of an exemption, that Buyer may be required under the FIRPTA provision in the WB-11 to execute a certification or affidavit, for example, to confirm intended residence of the property being purchased.

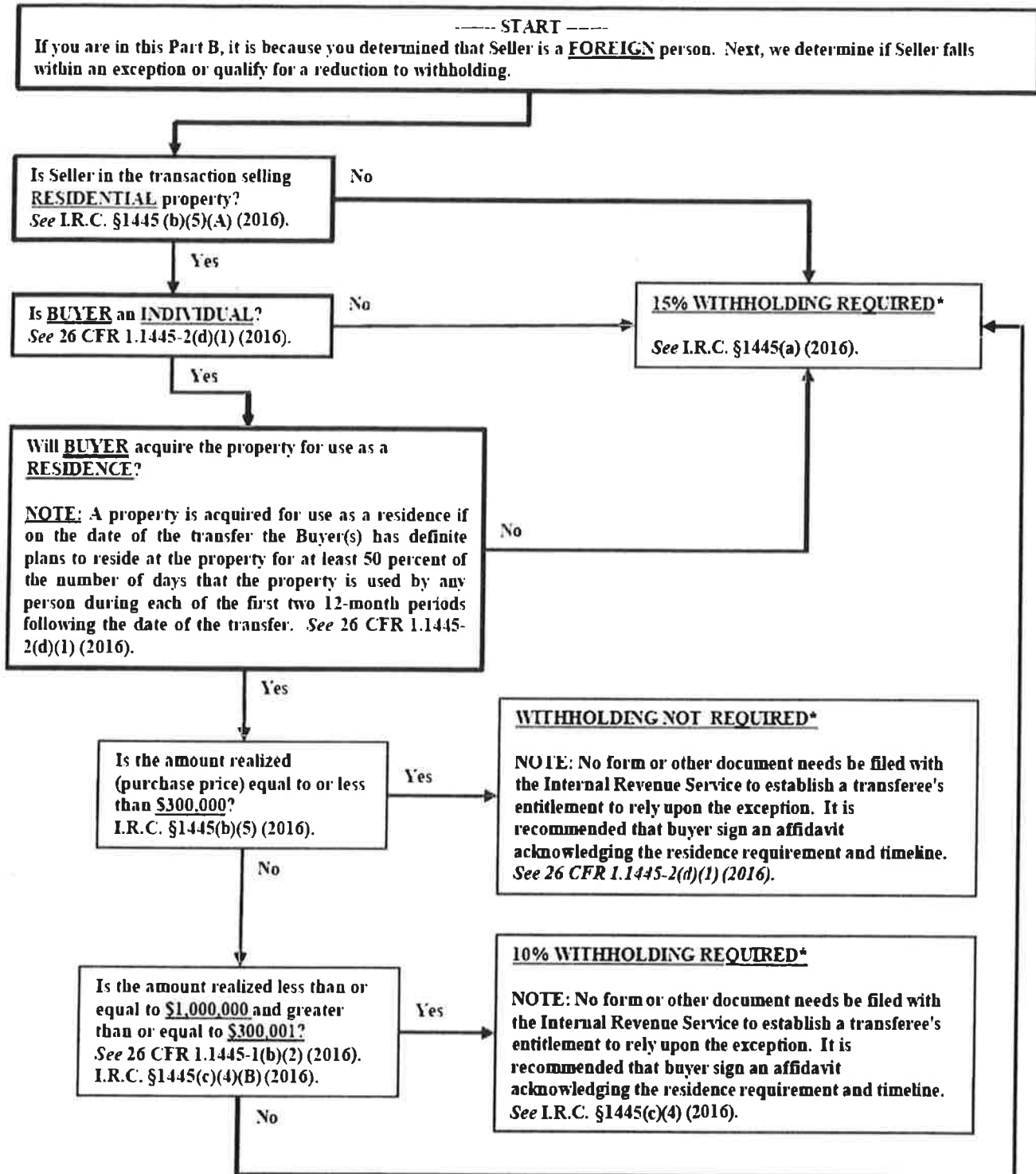
11. What if the Seller’s certification is false?

We cannot advise on the various scenarios that could play out, but the certification is not valid if the Buyer has actual knowledge it is false or receives notice from an agent or the qualified substitute that the certification is false. There is a duty to report notice or actual knowledge of any falsehood.

12. May real estate agents, closing agents and title companies determine if FIRPTA withholding is required?

No. Real estate agents, closing agents and title companies are not permitted by state or federal law to provide legal or tax advice regarding FIRPTA or any other tax or legal matter.

FIRPTA Paradigm: Part B — Residential Exceptions



***TAX AND LEGAL DISCLAIMER:** This material (paradigm) has been prepared for information purposes only (use as a guide) in connection with the disposition (sale) of real estate property (as opposed to an interest in a real estate holding entity) between unrelated parties and is not intended to provide, and should not be relied on for tax, legal, or accounting advice. You should consult your tax, legal, or accounting advisors before engaging in any transaction involving this issue.

Source: Florida Bar Journal, Vol. 92, No. 4, April 2018 (<https://www.floridabar.org/the-florida-bar-journal/to-withhold-or-not-to-withhold-that-is-the-question-a-step-by-step-approach-to-the-firpta-income-tax-withholding/>).

FIRPTA OFFER CONTINGENCY

for use with WB-12, WB-13, WB-14, WB-15, WB-16 and WB-17; and the 7/2011 WB-11.

NOTE: This Addendum is for optional use with all Offers to Purchase except the 1/1/20 WB-11 Residential Offer to Purchase. Do not use if drafting a WB-11 form that has a mandatory use date of 1/1/20.

1 Offer to Purchase Dated: _____
2 Property Address: _____
3 Buyer: _____

4 ■ **FOREIGN INVESTMENT IN REAL PROPERTY TAX ACT (FIRPTA)** Section 1445 of the Internal
5 Revenue Code (IRC) provides that a transferee (Buyer) of a United States real property interest must pay
6 or withhold as a tax up to 15% of the total "Amount Realized" in the sale if the transferor (Seller) is a
7 "Foreign Person" and no exception from FIRPTA withholding applies. A "Foreign Person" is a nonresident
8 alien individual, foreign corporation, foreign partnership, foreign trust, or foreign estate. The "Amount
9 Realized" is the sum of the cash paid, the fair market value of other property transferred, and the amount
10 of any liability assumed by Buyer.

11 **CAUTION: Under this law if Seller is a Foreign Person, and Buyer does not pay or withhold the tax**
12 **amount, Buyer may be held directly liable by the U.S. Internal Revenue Service for the unpaid tax**
13 **and a tax lien may be placed upon the Property.**

14 Seller hereby represents that Seller is not a Foreign Person. Buyer and Seller agree to comply with
15 FIRPTA requirements under IRC § 1445. No later than 15 days prior to the closing, Seller shall execute
16 and deliver to Buyer, or a qualified substitute (attorney or title company as stated in IRC § 1445), a sworn
17 certification under penalties of perjury of Seller's non-foreign status in accordance with IRC § 1445. Any
18 representations made by Seller with respect to this issue shall survive the closing and delivery of the deed.
19 If Seller fails to deliver certification of Seller's non-foreign status, Buyer shall be entitled to either: (1)
20 withhold the amount required to be withheld pursuant to IRC § 1445 from amounts otherwise payable to
21 Seller under this Offer; or, (2) terminate this Offer by written notice to Seller prior to closing. Buyer and
22 Seller shall complete, execute, and deliver, on or before closing, any other instrument, affidavit, or
23 statement needed to comply with FIRPTA, including withholding forms.

24 Firms, Agents, and Title Companies are not responsible for determining FIRPTA status or whether any
25 FIRPTA exemption applies. The Parties are advised to consult with their respective independent legal
26 counsel and tax advisors regarding FIRPTA.

27	Date: _____	Date: _____
28	_____	_____
29	Buyer	Seller
30	_____	_____
31	Buyer	Seller

SELLER CERTIFICATION OF NON-FOREIGN STATUS

Property Address: _____

Section 1445 of the Internal Revenue Code provides that a transferee (Buyer) of a United States real property interest must withhold tax if the transferor (Seller) is a foreign person.

To inform _____
_____ (Buyer) that withholding of tax is not required upon
the disposition of a United States real property interest by _____

_____, the undersigned hereby certifies the following on behalf of the Seller:

1. Seller is not a foreign person, foreign corporation, foreign partnership, foreign trust, or foreign estate, as those terms are defined in the Internal Revenue Code and Income Tax Regulations.

2. Seller's United States Taxpayer Identification Number (Social Security Number or Employer Identification Number) is legally valid and Seller certifies that Seller will provide directly to Closing Agent or Qualified Substitute. *

3. Seller's address is _____

_____.

4. Seller understands Buyer may disclose this certification to the Internal Revenue Service and any false statement contained herein could be punished by fine, imprisonment, or both.

Under penalties of perjury I declare that I have examined this certification and to the best of my knowledge and belief it is true, correct, and complete, and I further declare that I have authority to sign this document on behalf of Seller.

Dated this _____ day of _____, 20____.

Print name: _____ (Seller signature)

Print name: _____ (Seller signature)

Seller Entity Name (if any): _____
Print Name Here ▲

(x) _____
Authorized Signature ▲ Print Name & Title Here ► _____

*ADDED: [This document provides notification of Non-Foreign Status. Do not input Social Security or Tax Identification Number on this form. Seller will provide that information directly to the Qualified Substitute or the Closing Agent by secure means. Do not send Social Security or Tax Identification Number to real estate agents or real estate firm and do not send that information by email or other electronic means.]

CERTIFICATION OF FOREIGN STATUS UNDER FIRPTA

The purpose of this Certification is to notify Buyer of Seller's/Sellers' status under FIRPTA (Section 1445 of the Internal Revenue Code) with regard to a prospective real estate transaction involving the Property identified below.

This Certification is to be completed by each and any Seller to which it applies.

PROPERTY ADDRESS:

SELLER NAME(S) & ADDRESS(ES):

Seller's Name: _____

Seller's Address: _____

Seller's Name: _____

Seller's Address: _____

CERTIFICATION OF FOREIGN STATUS:

Seller certifies that Seller **IS** a "foreign person" as defined in the FIRPTA law.

Seller understands Buyer may disclose this certification to the Internal Revenue Service and any false statement contained herein could be punished by fine, imprisonment, or both.

Under penalties of perjury I declare that I have examined this certification and to the best of my knowledge and belief, it is true, correct, and complete, and I further declare that I have authority to sign this document on behalf of Seller.

Dated this _____ day of _____, 20_____

Seller: _____

Seller: _____

STIPULATIONS ON CERTIFICATION

Each Seller making this certification additionally certifies Seller will complete, prior to closing, any other documentation as may be required under FIRPTA or by the closing agent or qualified substitute, as defined under FIRPTA, and will fully comply with FIRPTA, including all withholding requirements, if applicable.

FIRPTA ADDENDUM

Offer to Purchase Dated: _____

Property Address: _____

The provisions of this Addendum modify or replace the corresponding provisions in the Offer or in any other addendum. The parties acknowledge the agents and Firm involved are providing no legal advice regarding interpretation or implementation of FIRPTA and/or the legality, appropriateness, sufficiency, or enforceability of any provision in this Addendum. The provisions may be modified or supplanted as the parties see fit and the parties are advised to consult their own legal counsel for any questions about FIRPTA or provisions of this Addendum.

Each Seller agrees to provide certification of Seller's status as "foreign" or "non-foreign" under FIRPTA (not including Seller's Social Security number or Tax Identification Number), within _____ days ("10" if left blank) after binding acceptance or inclusion of this Addendum, whichever is later. Each such Seller not providing such a certification shall be treated as having "Foreign Status" below. The provisions below apply depending upon Seller's and/or Sellers' certified status(es), or as indicated for all Offers, as follows:

Non-Foreign Status: If Seller, or one or more Sellers, certifies that Seller is NOT a "foreign person" under FIRPTA, the following applies to this Offer:

- Each such Seller agrees to complete a FIRPTA-compliant certification when and as due under FIRPTA, including Seller's Social Security number or Tax Identification Number, as may be required under FIRPTA or by the closing agent or qualified substitute, no later than closing, and Buyer acknowledges this satisfies any delivery of certification requirement otherwise stated in the Offer.
- The parties agree the FIRPTA-compliant certification will be executed by Seller directly with the closing agent or qualified substitute and not delivered to real estate agents or firms involved. The parties agree no Social Security number or Tax Identification Number will be provided, sent or copied to the real estate agents or firms involved.

Foreign Status: If Seller, or one or more Sellers, certifies that Seller IS a "foreign person" under FIRPTA (or fails to provide such certification of status, per above) the following applies to this Offer:

- Any representation of Seller status (at line 525 of the WB-11 or equivalent provision in any addendum or additional provision) is modified to state Seller is a "foreign person" under FIRPTA.
- Seller reaffirms Seller will comply with all requirements of FIRPTA, including any withholding requirements, as may be applicable. Seller further agrees that in the event net proceeds due Seller are insufficient to meet withholding requirement(s), Seller shall transfer to Buyer or closing agent, at closing, any additional funds necessary to satisfy the applicable requirement, and said funds shall be remitted to the IRS to meet any withholding requirement, as applicable.

Applicable to Both Foreign & Non-Foreign Status: The parties agree the provisions "*No later than 15 days prior to the closing*" at line 526 of the WB-11 and buyer termination right at line 531 of the WB-11 (and/or in both instances also in the equivalent language in any addendum or additional provisions), are removed from this Offer.

Date: _____

Date: _____

Buyer

Seller

Buyer

Seller